IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.7222 OF 2004

Dr.Manohar Madhav Jamkhindikar, .. Petitioner.

Vs

Mrs Shobha Sudhir Jamkhindikar, .. Respondent

Dr(Ms) K.N.Velankar, for the petitioner.

Mr Shashi Nair, for the respondent.

CORAM : D.B.BHOSALE,J.

DATE : 7h September, 2004

PC:

1. Heard the learned counsel for the parties.

2. This petition is directed against the order dated 16.6.2004 passed by the Family Court below Exhibit-15 in Petition No.B-22/2002, by which Exhibit-15 application for framing of an additional issue had been rejected. While rejecting the application, the learned Judge in paragraph 23 of the order held thus :

> "In any case issue framed is for the benefit of the Court. The issue can be framed at any stage of the proceeding. Non-framing of the issue is not fatal since the parties are aware about their own case. In the present case, the issue framed is just and proper."

3. The petitioner has filed the petition before the

Family Court seeking declaration that the marriage between his deceased brother Sudhir and respondent solemnised on 11.9.1989 was void ab-initio, inasmuch as it was violative of section 5(i) of the Hindu Marriage Act, 1955. The declaration was also sought that the respondent is not legally wedded wife of his brother late Sudhir and that she is not entitled to the status of his widow.

4. The respondent in her written statement has taken a categoric stand that she had taken customary divorce with her Ex-husband. In view of that, the petitioner prayed for framing of the following additional issues.

1) Does the respondent prove that there is an established custom of divorce in her community?

2) Does the respondent prove that her first marriage to Ganesh Samal was dissolved in accordance with the custom of divorce of the community?

5. Considering the pleadings of the parties, in my opinion, the additional issues as suggested by the petitioner, would be necessary for resolving the matter finally. The sole issue framed by the Family Court reads thus:

1) Does the petitioner prove that the marriage between late Sudhir Jamkhindikar and respondent dated 11.9.1989 was void ab initio?

6. Mr.Nair, learned counsel for the respondent, did not seriously oppose the prayer made in the petition and fairly stated that the burden is on the respondent- wife to establish the custom of divorce in their community and that her first marriage was dissolved in accordance with the said custom. Considering over all facts and circumstances of the case and submissions of the learned counsel for the parties, in my opinion, the impugned order deserves to be quashed and set aside. The learned Judge of the Family Court is directed to frame the additional issues as suggested by the petitioner within two weeks from the date of receipt of this order and shall decide the petition on merits in accordance with law.

. With these directions, the petition is disposed of.

. An authenticated copy of this order may be made available to the parties.

(D.B.BHOSALE, J.)